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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1620

~~MARGARET O'DONNELL, Administratrix, Successor Administratrix of~~ tate

Joseph Moss, Petitioner,

vs.

Margaret O'Donnell, Administratrix, etc., et al., Respondents.

~~IN THE MATTER OF THE PETITION OF: O. C. SCHMIDT BARGE LINES, INC., as owner of the Motor Vessel Mary R for exoneration from or limitation of liability.~~

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT O. ROONEY
PRETZEL, STOUFFER, NOLAN & ROONEY
100 W. Monroe Street
Chicago, Illinois 60603
FInancial 6-1973

Counsel for Petitioner Joseph Moss

JOSEPH B. LEDERLEITNER
Of Counsel

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3900

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In The

Supreme Court of the United States

October Term, 1973

In the case of GEORGE O'DONNELL, SR., Administrator of the Estate of GEORGE O'DONNELL, JR., Deceased,

Respondent,

vs.

O. L. SCHMIDT BARGE LINE and JOSEPH MOSS,

Petitioners,

Interpleaded in:

IN THE MATTER OF THE PETITION OF:
O. L. SCHMIDT BARGE LINES, INC., as owner of the Motor Vessel Mary R for exoneration from or limitation of liability.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Joseph Moss owner of a pleasure craft, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed an interlocutory decree in admiralty rendered in a split issues trial exonerating the owner of a barge and tug which collided with a sixteen (16) foot pleasure craft.

OPINIONS BELOW.

The opinion of the Court of Appeals is set forth in Appendix A to this Petition.

JURISDICTION.

The Court of Appeals decision was rendered on March 7, 1973. A timely petition for rehearing was filed and denied on April 9, 1973. This petition is filed within ninety (90) days of said date.

The jurisdiction of this Court is invoked under 28 USCA §1257.

ISSUE PRESENTED FOR REVIEW.

Should admiralty law be modernized to require a look-out on a barge in areas having marinas and known to be frequented by small pleasure craft?

STATEMENT OF FACTS.

(While the record is voluminous, the occurrence itself can be simply stated.)

The Occurrence

On August 19, 1968, the defendant's barge proceeding west and emerging from the dark south opening or draw of the Indiana Avenue Bridge over the Calumet River in the metropolitan area of Chicago collided with a boat operated in a southeasterly direction toward the same south opening or draw. It was dark, the water and barge were black and the occupants of the boat were thrown into or jumped into the water at or before impact. One of the occupants, George O'Donnell, Jr. drowned.

A detailed statement of the facts were set forth in the Petitioner's Brief of Appellant in the court below. The

Court of Appeals below approved the trial court's findings of fact and conclusions of law. The appellant does not accept the findings but in the interest of brevity, all those facts will not be repeated here. It suffices to note here that it is undisputed and uncontradicted that the Moss boat had its searchlight on and that the deckhand on the barge was never closer than thirty (30) feet back from the bow on the left or port side and then went amidship leaving the barge without a lookout. (A. 221-232)

Trial Facts

O. L. Schmidt Barge Lines, as owner of the Mary R, filed a petition for exoneration from or limitation of liability and an affidavit of value. (A. 1-7) A claim was also filed for damages for death of George O'Donnell, Jr. (A. 7-8) A claim was also made for personal injuries of Peter O'Malley (A. 9-10); for personal injuries to Joseph Moss (A. 10-11); for personal injuries to Lawrence Regan (A. 11-12); for personal injuries to Dean Steglich. (A. 12-13)

The Estate of George O'Donnell filed its Answer (A. 13-14); Joseph Moss filed his Answer. (A. 19-20) The Estate of O'Donnell filed its Complaint against the Barge Lines and Joseph Moss. (A. 21-24) This complaint alleged negligence against the Barge Lines and Joseph Moss. (A. 22-23) Joseph Moss filed his answer denying, in substance, the allegations of the complaint. (A. 24-26) Joseph Moss filed objections to the proposed findings of fact. (A. 30-39, 66-68) The trial court entered findings of fact and conclusions of law. (A. 41-58) A judgment order and decree of exoneration was entered and entering judgment of liability on cross claim against Joseph Moss. (A. 59-62) The appeal to the Court of Appeals was from the interlocutory decision in admiralty. (A. 63-66)

REASONS FOR GRANTING CERTIORARI.

THE DECISION FOR WHICH REVIEW IS SOUGHT OBDURATELY APPLIES ARCHAIC ADMIRALTY LAW TO EXONERATE A BARGE WHICH KEPT NO LOOKOUT BEFORE COLLIDING WITH A PLEASURE CRAFT. A MORE ENLIGHTENED APPROACH IMPOSES AN ESPECIAL DUTY OF LOOKOUT IN ANY AREA HAVING MARINAS AND KNOWN TO BE FREQUENTED BY SMALL BOATS. KEEPING ADMIRALTY LAW ABREAST OF THE TIMES WARRANTS REVIEW BY THIS COURT.

The evidence of record in this case at bar shows that as the barge slipped over black waters at nightime and was emerging from the draw of the bridge, the searchlight had been turned off, the pilot house was down, there was a blind spot in front of the barge. The Moss Boat had its searchlight on, the deckhand on the barge was never closer than thirty (30) feet from the bow on the left or port side and then went amidship. It was dark out and visibility is difficult. The evidence showed the barge personnel knew pleasure craft marinas to be in the area.

None of the Navigation Rules (Western River Rules) should excuse lookout under these circumstances.

Upon similar evidence other courts have held that the burden of proof shifts to the Barge Lines. *Dwyer Oil* v. *The Tug Edna Matton*, 255 F. (2d) 380 (2nd Cir. 1959). In the cited case the trial court held the Matton solely responsible and exonerated the Corporal. The reviewing court said: (page 382)

"Although the district judge made no specific finding, the testimony of the Corporal's watchman on cross examination clearly indicates that rather than standing in the front on the B No. 80 and looking up the channel, he was sitting against a tank 40 FEET FROM THE BOW OF THE BARGE and was watching the bank. This impresses us as being a clear violation of the above rule [Rule 26]. In that situation the burden was upon the Corporal to prove that this statutory violation could not have contributed to the commission in any way. (Citing cases)"

* * *

"The decree is modified to hold the Corporal jointly at fault with the Matton."

Aside from the official rules of navigation and statutory directions, prudent seamanship is required and the failure to exercise it is negligence which admiralty law should recognize and enforce. *Miller* v. *Semet-Solvay*, 406 F. (2d) 103 (4th Cir. 1969).

Just because the barges have long used our waterways for their own profit does not warrant giving them preferential treatment.

A more enlightened view raises an "especial duty of lookout" where pleasure craft and marinas are known to be in the area. In *Gregory, Jr., Admin.* v. *Paducah Midstream Service*, 401 S.W. (2d) 40 (Ky. 1966),

"The evidence discloses that at about noon on a clear day in August, 1962 Robert Hall, in the company of Robert May, was piloting a 17-foot pleasure craft, having a 75 horsepower outboard motor capable of propelling it 35 miles per hour, on Kentucky Lake. Hall was proceeding upstream on the lake in an area frequented by small boats when he sighted appel-

lee's tugboat traveling downstream in the Tennessee River channel of the lake. The tug was moving about seven miles per hour and was pushing four empty barges which were arranged two abreast. Hall passed the tug of its right side, crossed in back of the tug and proceeded downstream along its left side. He continued traveling in a straight course until he was about 450 feet beyond the nearest barge when he turned his boat to the right and into the path of the oncoming tug. Suddenly the motor of Hall's boat ceased functioning and the boat stopped in front of the barges. Hall and May abandoned the boat before it was struck by the barges; May was rescued, but Hall drowned. (It later was discovered that the gasoline tank connected to the motor was empty).

The barges occupied an area approximately 70 x 390 feet in front of the tug and their highest sections were 13 feet above the water line. Only the pilot and deck hand were on duty aboard the tug and they were stationed in the pilot house at the time of the accident. No one was aboard the barges. The pilot and deck hand testified that because their forward vision was obstructed by the barges for a distance of 1000-1200 feet they were unable to see Hall's boat after it passed the port side of the barges and were unaware of Hall's and May's dilemna until they were seen in the water alongside the tug. The pilot also testified that the tug would travel more than 150 feet, after stopping operations were begun, before their forward motion could be reversed.

Appellant contends that the failure to have a lookout posted on the barges constituted actionable negligence, and that Hall's act of crossing in front of the tug did not constitute contributory negligence as a matter of law. Appellant further contends that assuming Hall was contributorily negligent, it would

not bare recovery since this action is governed by admiralty law."

(page 42)

"THE ACCIDENT OCCURRED ON A PART OF THE LAKE THAT WAS FREQUENTED BY SMALL BOATS OPERATED BY VACATIONERS. WHILE A PROPERLY STATIONED LOOKOUT IS REQUIRED OF THOSE OPERATING VESSELS ON ANY NAVIGABLE STREAM, THE CUSTOMARY ACTIVITY IN THIS AREA OF THE LAKE PLACED AN ESPECIAL DUTY ON THE APPELLEE TO HAVE SUCH A LOOKOUT. *Monongahela River Consol. Coal & Coke Co.* v. *Lancaster's Adm'r, supra.*

Under the appellant's evidence it could reasonably be determined that the lookout would have warned the pilot of Hall's danger in time to have slowed the tug sufficiently to avoid the accident. * * *"

And in *Monogahela* v. *Lancaster's Adm'r,* 183 S.W. 258 (Ky. 1916) the reviewing court upholding sole liability of a barge similar circumstances to that in the instant case, aptly observed: (page 260)

"It may further be said that such negligence on the part of appellant's servants is shown by proof of their failure to maintain a proper lookout from the Alice Brown for boats that they knew were accustomed to be crossing the Ohio river at the time and place of the accident, in their failure to give any warning of the coming of the boat, and also in the unusual speed at which they were running it. Such an amount of travel at the point in question put upon those in charge of the Alice Brown the duty of anticipating the presence of boats and their occupants on the river and of maintaining a lookout for them and so operating the boat and tow at such

> a reasonable rate of speed and with proper signal of its coming as would give occupants of such boats an opportunity to avoid collision with the boat and tow."

When the cited cases are considered in the light of the evidence of record, the decision in the case at bar exonerating the barge is a shocking refusal to recognize the place of modern day marinas and pleasure craft on our waterways. The decision gives unwarranted deference to the low slung commercial barge, which has long plied the inland waterways unchallenged and for its own profit, and now is accorded an absolute right of way—it may proceed without a lookout.

Respectfully submitted,

Robert O. Rooney
Pretzel, Stouffer, Nolan & Rooney
100 W. Monroe Street
Chicago, Illinois 60603
FInancial 6-1973

Counsel for Petitioner Joseph Moss

Joseph B. Lederleitner
Of Counsel

APPENDIX "A"

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1972

Nos. 71-1498, 71-1499, 71-1500

In the Matter of the Petition of O. L. Schmidt Barge Lines, Inc., as Owner of the Motor Vessel MARY R. for exoneration from or limitation of liability.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 377
ABRAHAM L. MAROVITZ, *Judge.*

ARGUED NOVEMBER 27, 1972 — DECIDED MARCH 7, 1973

Before KILEY and STEVENS, *Circuit Judges,* and ESCHBACH, *District Judge.**

ESCHBACH, *District Judge.* A petition was brought in the district court by O. L. Schmidt Barge Lines, Inc. ("Schmidt"), as owner of the tugboat M/V MARY R, for exoneration from or limitation of liability for loss, damage and injury arising out of a collision on the Little Calumet River between the barge in tow of the MARY R and a motorboat owned and operated by Joseph Moss. Claims for damages for personal injuries were filed in limitation proceedings by Moss and the other occupants of the motorboat who survived the collision (Dean Steglich, Peter O'Malley and Lawrence Regan). Claims for wrongful death were filed by the Administrator of

*District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

the Estate of George O'Donnell, Jr., an occupant of the motorboat who was drowned in the accident, against both Schmidt and Moss. After a trial on the issue of liability before the district court sitting in admiralty, a decree was entered exonerating Schmidt from liability for the casualty. Judgment was also entered granting recovery for the decedent's estate on the issue of liability on its cross-claim against Joseph Moss.

Moss appeals in No. 71-1499 from the judgment of the trial court finding him liable for the collision and, in No. 71-1500, from the decree exonerating Schmidt. The latter appeal originally included claimants Steglich, O'Malley and Regan, but was later dismissed as to them pursuant to their motion. O'Donnell's estate appeals only from the decree of exoneration in favor of Schmidt. (No. 71-1498). We affirm.

The collision occurred at about 9:00 P.M. on August 19, 1968, immediately west of the Indiana Avenue Bridge over the Little Calumet River at Chicago, Illinois. The MARY R was proceeding down the river in a westerly direction pushing in front of it Barge No. 26, a 254-foot tank barge which was empty at the time. As the MARY R approached the Indiana Avenue Bridge, its speed was slowed to enable passage of the 50-foot wide barge through the south draw of the bridge, a passage having a width of about 62 feet. The towboat maintained a speed of about three miles per hour until the time of the collision. The pilot of the MARY R used a searchlight to illuminate the banks of the river and the pilings protecting the south draw of the bridge. Gerald Toomey, a deckhand who was acting as lookout, stood on the forward end of the barge with his back to the pilot and gave flashlight signals to guide the barge through the opening. As the head of Barge 26 cleared the east pile clusters of the south draw, Toomey turned and walked aft on the barge to take down a warning flag so that it would not hit the underside of the bridge as the barge passed through the draw.

As the MARY R was descending the river toward the Indiana Avenue Bridge, the 16-foot outboard motorboat which Moss had purchased only two days earlier was docked at the Seaways Marina gas dock which was

located on the north bank of the river approximately 130 feet west of the Indiana Avenue Bridge. Moss and his companions had stopped there shortly after 8:00 P.M. to purchase some beer in a tavern at the marina. Moss had never owned a boat prior to August 17, 1968, and had no significant experience operating a boat. He had taken the new boat out on only one prior occasion, on August 18, the day before the accident, and had been through the Indiana Avenue Bridge on one round trip. The boat contained no life preservers or buoyant apparatus of any kind.

Moss and Steglich remained in the boat while O'Malley, Regan and O'Donnell went up to the tavern at Seaways Marina. When the three young men returned some time later, Moss departed from the gas dock and proceeded toward the south draw of the bridge on a course roughly parallel to Indiana Avenue. Prior to the collision, a witness on the north shore near the marina observed the starboard and bow running lights of the barge as it began emerging from the draw of the bridge. The small boat collided with the front of the barge just as the latter was clearing the protective pile cluster at the northwest corner of the bridge draw. The occupants of the motorboat jumped out just prior to contact and all but O'Donnell reached safety.

The trial court found that Moss was guilty of a number of violations of the Rules of the Road for Western Rivers, 33 U.S.C. § 301 et seq., and the Pilot Rules for Western Rivers, 33 C.F.R. § 95.01 et seq. The court found that these violations constituted gross fault in the aggregate and were sufficient in themselves to account for the collision. As to the conduct of the MARY R, the court found no violation of Rule 24(b) of the Rules of the Road, 33 U.S.C. § 349(b), which provides that when a vessel is approaching a blind bend and has a tow ahead of her, "[W]hen the head of such tow is within six hundred yards of such bend . . . [she] shall give a signal by three distinct blasts of her whistle." It was further found that even if Toomey had been positioned in the most favorable possible place to observe approaching craft as the barge emerged from under the bridge, he could not have seen or warned Moss in time to prevent the collision.

In an admiralty case, as in the ordinary civil case under Rule 52(a) of the FEDERAL RULES OF CIVIL PROCEDURE, the findings of the trial court may not be set aside unless they are clearly erroneous. *Commercial Transport Corp.* v. *Martin Oil Service, Inc.*, 374 F.2d 813, 817 (7th Cir. 1967); *In re Rapp's Petition*, 255 F.2d 628, 632 (7th Cir. 1958). Although appellants challenge a number of the court's conclusions of law, the main thrust of their argument on appeal is that the evidence at trial did not support the court's decision as a factual matter. We find nothing in this record to indicate clear error in the findings of the experienced trial judge who heard the evidence and observed the witnesses in this case.

An examination of the record shows that the pilings and center pier of the bridge effectively obstructed the view which a lookout stationed at the head of the barge would have had of the Moss boat until seconds before the collision. The precise amount of time can be estimated at somewhere from one to five seconds on the basis of evidence as to the location at which the collision occurred (five to twenty feet west of the northwest pile cluster) and the testimony of the occupants of the motorboat that they did not see the barge until two to five seconds before the collision. Under these circumstances, the finding that Toomey's absence from the head of the barge was immaterial and could not have been a contributing cause of the collision is substantially supported by the evidence. Therefore, even if there was a breach of the duty to keep a proper lookout, the fact that a lookout could not have prevented the collision precludes a finding of liability on that basis. *Tidewater Associated Oil Co.* v. *United States*, 60 F.Supp. 376 (S.D. Calif. 1945); *The Bouker No. 2*, 254 F. 579 (2d Cir. 1918); *The Transfer No. 21*, 248 F. 459 (5th Cir. 1918). Appellants contend that a failure to keep a proper lookout is a statutory fault which casts upon Schmidt the burden, under the rule of *The Pennsylvania*, 86 U.S. 125 (1874), of showing "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *See Ulster Oil Transport Corp.* v. *The Matton No. 20*, 210 F.2d 106 (2d Cir. 1954); *Gulf Oil Corp.* v. *The Socony No. 16*, 162 F.2d 869 (2d Cir. 1947). *Compare Anthony* v. *International Paper Company*, 289 F.2d 574 (4th Cir.

1961). As indicated above, however, the court specifically found that such a showing had been made by stating that "[e]ven if a lookout were required on the starboard forward corner, he could not have seen or warned Moss in time to prevent the collision."

Appellants attempt to attribute fault to the MARY R for not sounding a danger signal as required by Rule 24(a) of the Rules of the Road for Western Rivers, 33 U.S.C. § 349(a), or otherwise warning Moss prior to the collision. Rule 24(a) provides as follows:

> If, when steam vessels are approaching each other either vessel for any reason fails to understand, or regards as unsafe, the course or intention of the other, the vessel in doubt shall immediately so signify by giving several short and rapid blasts of her whistle, at least 4, the danger signal.

We agree with Schmidt that the rule applies only to those situations where a vessel is aware of "the course or intention of the other vessel". In light of the inability of the MARY R to see the Moss boat until it was too late to avoid the collision, any warning would have been futile and the rule requiring a danger signal is inapplicable.

The trial court found that the MARY R did not violate Rule 24(b), 33 U.S.C. § 349(b), which requires a bend signal to be sounded "within 600 yards" of a blind bend in the river. The court interpreted the rule as not prescribing a minimum distance within which such a signal must be sounded and that the practice of the pilot of the MARY R to sound a bend signal as soon as he cleared the Indiana Avenue Bridge was "both reasonable and prudent". It is unnecessary, however, to decide whether the trial court's interpretation of the language "within 600 yards" was correct or whether, given that interpretation, the finding of reasonableness was erroneous. The court in its conclusions of law stated as follows:

> There are many cases where the vessels failed to blow a bend signal at all and were found at fault for colliding with vessels rounding bends, but none of these cases is analogous, because this collision did not happen at a bend, and Moss was never around

> the bend at any time when the Mary R was within 600 yards of the bend. *The law did not contemplate the sounding of a signal for the benefit of Moss, only for the benefit of vessels below the bend.* (Emphasis supplied.)

We agree that the bend signal rule imposed no duty upon the MARY R with respect to Moss.

The question of the applicability of the bend signal rule to the facts of this case is controlled by principles recently stated by the Supreme Court in *Union Oil Company of California* v. *The Tugboat San Jacinto*, ... U.S. ....., 93 S.Ct. 368 (1972). In that case, the SS SANTA MARIA and the tugboat SAN JACINTO were approaching on opposite sides of a well-defined and relatively narrow channel. Although the visibility in the direction in which the SANTA MARIA was headed was almost two miles, there was heavy fog to the left. The SAN JACINTO emerged from the fog bank only 900 feet away, executing a U-turn in front of the SANTA MARIA which caused a barge in the tow of the SAN JACINTO to crash into the bow of the SANTA MARIA. The Court of Appeals held that the SANTA MARIA violated Rule 16 of the Inland Rules of Navigation, 33 U.S.C. § 192, "the half-distance rule", which requires a vessel to travel in conditions of fog at a speed which will enable it to come to a standstill before it would collide with a vessel it could see through the fog. The Supreme Court reversed the judgment for half-damages against the SANTA MARIA which the Ninth Circuit had based on such statutory fault. The Court found implicit in the rule the assumption that vessels can reasonably be expected to be traveling on intersecting courses, and went on to state that:

> "There is no evidence in the record suggesting that the speed of the tanker would have prevented her from coming to a complete halt within half the distance of sighting a vessel that was either proceeding on a remotely foreseeable intersecting course or else being overtaken by her. The tug emerged from a fog bank only 900 feet from the tanker on a course and for reasons that no seaman could, under the circumstances, have anticipated." 93 S.Ct. at 372.

The Court held that "fault based on the half-distance rule must have some relationship to the dangers against which that rule was designed to protect". Therefore, liability rested on the SAN JACINTO alone.

Likewise, in the instant case, fault based upon the bend signal rule must have some relationship to the dangers against which that rule was designed to protect. The rule clearly applies only to situations in which a steam vessel "is nearing a bend in a channel where, from the height of the banks or other cause, a steam vessel approaching from the other direction cannot be seen for a distance of six hundred yards. . . ." 33 U.S.C. § 349(b). The rule was designed to protect against the danger of collision between vessels whose vision of each other is obscured by a bend in the channel. There was no bend in the Little Calumet River which obscured the Moss boat from the view of the MARY R. The obstruction was the Indiana Avenue Bridge. Appellants do not contend that the bend signal rule should be interpreted to require such a signal six hundred yards from every obstruction to a full view of the channel ahead. They assert merely that the signal should have been sounded above the Indiana Avenue Bridge for the bend in the river some 400 yards downstream from the bridge. However, we cannot agree that the failure to timely sound such a signal to warn vessels on the other side of the bend results in fault for collisions with vessels hidden from view by a bridge which is fortuitously situated within 60 yards of the bend. If any duty is owed to approaching vessels which may be hidden by a bridge, the requirement of a signal should not be determined by whether there happens to be a bend in the river nearby. Therefore, the district court was correct in holding that the MARY R was not at fault for not sounding a bend signal before passing under the Indiana Avenue Bridge. Under *Union Oil, supra,* the collision between the Moss boat and the MARY R had no relationship to the dangers against which the bend signal rule was designed to protect.

Appellants urge that the MARY R should not be exonerated from liability on the basis of the rule that "where the active fault of one vessel so flagrantly and heavily outweighs the passive faults of omission of the

other vessel, the interests of justice are best served by condemning the more culpable vessel completely". *Cia. Maderas, etc.* v. *The Queenston Heights*, 220 F.2d 120, 123 (5th Cir. 1955), *cert. denied*, 350 U.S. 824, 76 S.Ct. 52 (1955). Accepting appellants' contention that such a rule, though well-established, must be carefully applied, we find that the evidence supports the trial court's finding that the fault of Moss was "glaring" and was sufficient in itself to account for the collision. Discussion of the so-called "major-minor fault rule", however, is unnecessary because there is ample evidence in the record to support the exoneration of Schmidt even under the strictest standards required by the rule of *The Pennsylvania*, *supra*. Since there was no fault on the part of the MARY R for not sounding a bend signal, Schmidt was not required to make a showing that such a fault could not have been a cause of the collision. The only remaining faults urged by appellants arise out of the alleged failure of the MARY R to keep a proper lookout. Although the trial court cited the *Cia. Maderas* case, *supra*, Judge Marovitz specifically found, on the basis of substantial evidence, that a properly stationed lookout "*could not* have seen or warned Moss in time to prevent the collision". Thus, we need not consider whether the lookout was inadequate, or whether an inadequate lookout would constitute a "major" or "minor" fault. Further inquiry is foreclosed by the finding that no causal connection existed between any such fault and the collision. That finding, not being clearly erroneous, satisfies the strict requirements of *The Pennsylvania*.

The judgments appealed from are affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

APRIL 9, 1973

Before

Hon. ROGER J. KILEY, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

Hon. JESSE E. ESCHBACH, District Judge

In the Matter of the Petition of O. L. SCHMIDT BARGE LINES, INC., etc., Petitioner-Appellee,

No. 71-1498 vs.

MARGARET O'DONNELL, Administrator of the Estate of George O'Donnell, Jr., Deceased, Claimant-Appellant.

In the Matter of the Petition of O. L. SCHMIDT BARGE LINES, INC., etc., Petitioner-Appellee,

Nos. 71-1499, 71-1500 vs.

JOSEPH MOSS, Defendant-Appellant Claimant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. (69 C 377)

On consideration of the petitions for rehearing filed in the above-entitled causes,

IT IS HEREBY ORDERED that the petitions for rehearing in the above-entitled appeals be and the same are hereby denied.

FILE COPY

FILED
JUL 3 1973
MICHAEL RODAK, JR., CLERK

No. 72-1620

In the
Supreme Court of the United States

OCTOBER TERM, 1973

In the Matter of the Petition of
O.L. SCHMIDT BARGE LINES, INC., as
Owner of the M/V MARY R for Exoneration
from or Limitation of Liability.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For the Seventh Circuit

BRIEF OF RESPONDENT, O.L. SCHMIDT BARGE LINES, INC. IN OPPOSITION TO THE PETITION OF JOSEPH MOSS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOSEPH V. MCGOVERN
MICHAEL A. SNYDER
Counsel for Respondent,
O.L. SCHMIDT BARGE LINES, INC.

Of Counsel:
BRADLEY, EATON, JACKMAN & MCGOVERN
135 South LaSalle Street
Chicago, Illinois 60603

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1620

In the Matter of the Petition of
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BRIEF OF RESPONDENT, O.L. SCHMIDT BARGE LINES, INC. IN OPPOSITION TO THE PETITION OF JOSEPH MOSS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT

I.

O.L. SCHMIDT BARGE LINES, INC., IS NOT A JOINT PETITIONER FOR A WRIT OF CERTIORARI.

Petitioner, Joseph Moss, has captioned his Petition for a Writ of Certiorari, as follows:

"In the case of GEORGE O'DONNELL, SR., Administrator of the ESTATE OF GEORGE O'DONNEL, JR., Deceased,

Respondent,

vs.

O.L. SCHMIDT BARGE LINE and JOSEPH MOSS,
Petitioners,

Interpleaded in:
IN THE MATTER OF THE PETITION OF:
O.L. SCHMIDT BARGE LINES, INC., as Owner of the Motor Vessel MARY R for Exoneration from or Limitation of Liability."

This caption implies that O.L. Schmidt Barge Lines, Inc. (hereinafter "Schmidt") and Joseph Moss are petitioning for a writ of certiorari. This is not correct. Schmidt was granted a decree of exoneration by the United States District Court for the Northern District of Illinois, Eastern Division, Civil Action No. 69 C 377, the Honorable Abraham L. Marovitz, District Judge, presiding. On March 7, 1973, the United States Court of Appeals for the Seventh Circuit filed its Opinion in consolidated appeals nos. 71-1498, 71-1499 and 71-1500, affirming the Findings of Fact and Conclusions of Law of the District Court.

Schmidt, having prevailed in both the trial and appellate courts, does not petition for a writ of certiorari.

II.

THE ISSUE PRESENTED FOR REVIEW BY PETITIONER JOSEPH MOSS DOES NOT CONSTITUTE A JUSTICIABLE CASE OR CONTROVERSY.

Petitioner, Joseph Moss, has presented a single issue for review, which is:

"Should admiralty law be modernized to require a lookout on a barge in areas having marinas and known to be frequented by small pleasure craft?"

Respondent, Schmidt, submits that this is no issue at all, because the law is clear that a lookout is always required on every vessel in navigation. Both the trial court and the Seventh Circuit recognized this requirement and went on to apply the maritime legal principle that the absence of a lookout will not cast a vessel in fault in those circumstances where he could not have seen the other vessel in sufficient time to avoid the collision. Affirming the District Court on this issue, the Court of Appeals stated:

"An examination of the record shows that the pilings and center pier of the bridge effectively obstructed the view which a lookout stationed at the head of the barge would have had of the Moss boat until seconds before the collision. The precise amount of time can be estimated at somewhere from one to five seconds on the basis of evidence as to the location at which the collision occurred (five to twenty feet west of the northwest pile cluster) and the testimony of the occupants of the motorboat that they did not see the barge until two to five seconds before the collision. Under these circumstances, the finding that Toomey's absence from the head of the barge was immaterial and could not have been a contributing cause of the collision is substantially supported by the evidence. *Therefore, even if there was a breach of the duty to keep a proper lookout, the fact that a lookout could not have prevented the collision precludes a finding of liability on that basis.* Tidewater Associated Oil Co. v. United States; 60 F. Supp. 376 (S.D. Calif. 1945); The Bouker No. 2, 254 F. 579 (2nd Cir. 1918); The Transfer No. 21, 248 F. 459 (5th Cir. 1918) . . ." (Page 4a of Moss Petition) (Emphasis supplied)

There is no legal issue to be decided by this court. It was never held, as Moss's single "Issue" implies, that a lookout was not required. The district court found as a fact that in the circumstances of this case, the absence of a lookout could not have contributed to cause the collision. The appellate court correctly affirmed.

The trial court found that the gross faults of Moss (who petitions for certiorari herein) were "glaring", and were sufficient in themselves to account for the collision, and found that Moss and his negligently operated outboard motorboat were solely at fault. The Court of Appeals properly affirmed the Findings of Fact and Conclusions of Law.

CONCLUSION

We submit that there is no justiciable issue presented for review by this court. The Petition of Joseph Moss should be denied.

Respectfully submitted.

O.L. Schmidt Barge Lines, Inc.,
By its attorneys,
Joseph V. McGovern
Michael A. Snyder

Bradley, Eaton, Jackman & McGovern
135 South LaSalle Street
Chicago, Illinois 60603
FRanklin 2-3827